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Panel 3: Free Speech and Freedom of Religion

PANEL 3: FREE SPEECH AND FREEDOM OF RELIGION

MODERATOR: ERIC SEGALL

PANELISTS: MIKE DORF AND EUGENE VOLOKH

Professor Eric Segall: Our speakers for this lunch panel on freedom of speech and freedom of religion are Mike Dorf, again, from Cornell, and Eugene Volokh from UCLA Law School in Los Angeles.

So, we're going to talk about speech, and we're going to talk about religion, and we're going to talk about cases that intersect with speech and religion. But, let's start with this: Jonathan Adler, who is over there, wrote when Justice Kennedy retired—I think others wrote this, but I think Jonathan wrote it best—that Justice Kennedy was our most speech-protective Justice I guess in history, I think is what you said. Is that true? And if so, why do you think that was?

Professor Michael Dorf: I'll start on whether it's true.

Yes, but I would add the qualification, except in cases involving students and the government as proprietors or employee speech cases.

If you think about the great free speech champions of Supreme Court history, you have the later Holmes, Brandeis, then you have to go way into the middle of the 20th century to get Brennan, and then I think from there it's Kennedy.

So yes, although I'm not sure why. I'm interested in Eugene's hypothesis, and then I'll offer my small non-hypothesis.

Professor Eugene Volokh: I don't know why. I do think it's generally true. I think it's quite right that when it comes to

government in certain kinds of managerial roles, especially as employer, he was less protective, though it's not just him.

For instance, if you look at the *Janus* case, Justice Kagan, for the four liberals, was willing to totally throw government employee speech, more generally, under the bus, basically saying that any time an employee says something that is on the job and about the job to colleagues, that's constitutionally, categorically unprotected; even Chief Justice Rehnquist—then-Associate Justice Rehnquist—wasn't willing to go that far in restricting their speech.

So, government employee speech is a complicated question. I think the case that Mike was probably most referring to is *Garcetti v. Ceballos*, which I think is a difficult case, although quite possibly one which Justice Kennedy and the other conservatives in the majority got it wrong.

But in general, yes. Certainly, in his era on the Court, he was the Justice who was most consistently speech protective, although not entirely, not always speech protective.

Professor Dorf: So now I'm going to offer my hypothesis. I have a two-part hypothesis. I will try not to give a speech. If you want the longer version, it's on my blog today, dorfonlaw.org.

Professor Segall: I recommend Dorf on Law, by the way. All right.

Professor Dorf: So, one—my sort of null hypothesis is that Justice Kennedy was simply an applied libertarian when it came to speech. He believes in liberty generally. The word "liberty" appears all over his opinions. *Planned Parenthood v. Casey* begins with "Liberty . . . ." It's there in the gay rights cases. And so, if you're a libertarian, here you've got a provision of the Constitution talking about the right to freedom of speech, free exercise of religion shall not be abridged. Sure, it's a nice fit.

In this view, Kennedy is unlike Holmes, who has a theory of the marketplace of ideas. He's not like Brandeis, who has a theory of the

role of speech in promoting self-government. John Hart Ely has an elaborate conception of free speech that that sort of builds on the work of the Warren Court in reinforcing representation. Kennedy doesn't have anything like any of that. He's just a libertarian, and the First Amendment reads like a very libertarian provision. That's my null hypothesis.

My slightly revised hypothesis builds on something Justice Kennedy told me in private but I don't think I'm telling tales out of school. There was a case decided the term I clerked which posed, among other things, the question whether the mall-like areas of an airport are a public forum.

Now, if you know free speech doctrine, you know that whether a government property counts as a public forum or some other kind of forum is significant for how much power the government has to restrict speech there. And the majority on this point said no. Justice Kennedy wrote a dissent in which he said yes, it should be considered a public forum. But it's technically a concurrence because of the way they decided the case.

Now for the revelation. Before a case was argued, Justice Kennedy would sometimes gather his law clerks in his chambers to talk through the issues. And he'd have whichever law clerk had written the bench memo or otherwise prepared it give a little presentation. And then we'd all talk it through. It was our own little intra-chambers oral argument. And it was a lot of fun. He didn't do it in all the cases, but he did it in the ones where he thought we would all be interested.

I don't remember whether I was the law clerk on the case or one of my co-clerks was. In any event, one of us presents it. The case involved Hare Krishnas handing out literature and soliciting funds in one of the New York-area airports. One of my co-clerks says, "You know, people, when people are traveling through airports, they're in a hurry. They're stressed. I think about my grandmother. She doesn't want to be bothered by these people. They're annoying."

Justice Kennedy gets a little twinkle in his eye, and he turns to my co-clerk. He says, "The point of the First Amendment is to annoy people."

So, I think that played a little bit of a role in his First Amendment jurisprudence

Professor Segall: So, we should spend, I think, a fair amount of time on *Citizens United* because I think, if we look back from historical perspective, *Citizens United* will be one of the defining, historical cases both for Justice Kennedy and of this time period.

Before we get into Justice Kennedy's role in all that, I think it's a very misunderstood case in the sense that I assume both of you—I know you—but I assume both of you agree, the result, the narrow result, was correct. Do I have that correct? And maybe you could tell—just go through it a little bit, the facts, the holding, and how they had to rule the way they did, I think.

Professor Dorf: You mean as applied to the feature-length film?

Professor Segall: Yes.

Professor Dorf: Yeah, I think that's right.

Professor Segall: Give the background.

Professor Volokh: Well, so Citizens United was an organization, organized as a corporation, that got contributions from, among other things, business corporations. And they were distributing videos, generally from the Right—probably exclusively from the Right—and one of them was a long criticism of Hillary Clinton, who was then, I think, running for office.

And a federal statute barred non-media corporations from spending general treasury funds—so just the normal funds that they have as opposed to some specialized, limited, segregated fund—spending their funds to advocate for or against candidates for office. The statute had to do with television and radio ads, and there were

particular limitations on such ads within some amount of time of the election. I think those were in play in that case as well.

In any event, the Court said this was unconstitutional. So, I take it Eric's point was that maybe the dissenters got it wrong in saying that Citizens United could be restricted this way because Citizens United was pretty clearly a media entity and maybe should have these First Amendment rights as a media entity to speak out through the form of distributing DVDs.

But the majority reached a broader conclusion. It concluded that corporations, as well as unions, which are treated the same way under the relevant statutory schemes, categorically have the right to speak about all sorts of topics, including candidates for office. Just as in 1978, the Court, by a five-four vote, said that they have the right to speak about ballot measures, so they have the right to speak about candidates.

In the process, they reversed a decision, a six-three decision, called *Austin v. Michigan Chamber of Commerce*, which had in 1990 held the opposite, had said there's basically an exception to corporate free speech rights for speech about candidates.

Note, by the way, that it was very well settled at the time that corporations have First Amendment rights more generally. This had been established in 1936, essentially, as to media corporations. And then in 1941 or 1945, depending on how you count it, the Court made that clear about business corporations as well. So, it was really quite well settled.

The question was whether there was a special rule for non-media corporations when they wanted to speak about candidates. And the majority said no, there is no such special rule, that just as corporations can speak about lots of other topics, and just as media corporations can speak about candidates and routinely do spend a lot of money from the general treasury speaking about candidates, so non-media business corporations, either directly or through

contributing money to other groups like Citizens United, have the right to do the same.

Professor Segall: Do you agree that the result was correct?

Professor Dorf: Yes. *Citizens United* was re-argued after being initially argued as a relatively narrow statutory case. During one of the oral arguments, the question was posed to the lawyer defending the statute, "under your theory of treating this feature-length film called 'Hillary: The Movie' as campaign speech, under your theory could the statute be validly applied to a book?" And he said yes. And the conventional wisdom is that was the end of the case. And then it was just a question of how it was going to be written up.

The problem with the dissent is that, while it's very good at showing all the ways in which there are problems with the majority, especially as Eric, the other Eric, pointed out on a previous panel, the fact that the—I lost my train of thought. Where'd he go? Yeah, what was your point?

Professor Eric Berger: That the majority undervalues—

Professor Dorf: Oh, yeah, yeah, yeah. Right, the corruption. Right, that the majority dismisses any notion of corruption other than quid-pro-quo bribery. So that's a real problem, although it's not a problem unique to *Citizens United*. It is a problem, if it is a problem, in the whole line of campaign-finance cases.

Alright, so the dissent's very good. But they don't offer a limiting principle. What can be said in favor of the majority's approach, or at least the outcome, is that there are very, very hard line-drawing problems if you're going to say that some corporate speech is allowed and other kinds of corporate speech are not allowed.

Professor Segall: And in fact, when the case was re-argued, Elena Kagan as Solicitor General was asked the same question about books. And she—

Professor Dorf: Oh, yeah. It was Kagan. That's right.

Professor Segall: It was both. And Justice Kagan kind of fumbled the question because there is no good answer to that question.

So, if we agree that the government may not censor or block a movie about Hillary Clinton thirty or sixty days before an election, I assume most of us would agree with that. Then—

Professor Volokh: Not the four dissenters. They were fine with the government censoring that.

Professor Segall: How did *Citizens United* grow to be the symbol of everything that's wrong in America, which is what, in terms of politics, which is what it currently is in a lot of the popular media?

Professor Volokh: So, in the middle of the last decade, I saw this. I'm sure many of you observed this about the PATRIOT Act—people were saying, for instance, that in Guantanamo, all these people are being detained under the PATRIOT Act. Nothing whatsoever to do with the PATRIOT Act; it just became a stand-in for what some people viewed as abuses .in the War on Terror. But that simply reflects people's lack of k/nowledge about what the Patriot Act or *Citizens United* actually did. Ilya's here, he could tell us all about voter ignorance. But al of you know that ignorance is an natural human state. I'm ignorant of lots and lots of things. I probably have similar short-hands in my mind for things that I don't know. The symbolic meaning of *Citizens United* that you mentioned simply reflects the fact that the public, including many activists, doesn't really think much about these details, because they're not paid to. They've got day jobs.

So really, I think what Mike was alluding to is *Buckley v. Valeo* said—today quite controversially, at the time, it was seven-one. It said essentially that notwithstanding what I think all of us have to acknowledge are real risks of subtle corruption stemming from independent expenditures, and the fact that some people have more money to spend than others, that nonetheless people have a right to

buy an ad in a newspaper saying, "Oppose Senator Sasse because he backs Brett Kavanaugh," let's say. People have a right to do that. That's a part of their First Amendment right to spend their own money to do that.

Once you say that, it becomes much harder to say, "But they can't do that through the form of a corporation or through the form of a union," which is what federal election law did for a time, under *Austin v. Michigan Chamber of Commerce* and *McConnell v. FEC*.

So, I think that to people *Citizens United* becomes a stand-in for free speech principles applied to protect people's ability to spend money to talk about elections. I think a lot of the critics of *Citizens United* also don't think about the media, which has, again, an unquestioned right to spend money about elections, a right that could also lead to inequality and corruption. Indeed, the broadly accepted rights of the media, including the corporate-owned media, are part of the reason for *Buckley*, and clearly part of the reasoning of *Citizens United.* Among other things, it's too hard to draw the line, and kind of improper to draw the line, between some business corporations who speak about these things for a living having the right to do that and other business corporations (and rich individuals) who want to speak about it briefly not having the right to do that.

Professor Segall: Mike, do you agree—because I don't—that the line between the *New York Times* and Fox News and media corporations and Exxon would be too hard to draw or harder to draw than an infinite number of lines redrawing constitutional law every day?

Professor Dorf: I think it is a hard line to draw. Most media corporations are—I don't know about "most"—many media corporations are divisions of giant mega-corporations that have all sorts of other business.

Now, it is considered responsible journalism to separate the business side from the editorial and news side of the organization.

But one of the things that we've seen not just in this area but in other areas, like for example, under state law for journalists' privilege to shield sources, is that it's much harder than it used to be to distinguish who's a journalist from everybody else.

Am I a journalist? I have a blog.

I thought about this pretty hard a few months ago because one of my co-bloggers, not Eric, published a leak on my blog. She ran it by me first, and I decided to do it because I concluded that I am a journalist, and I didn't know her source, and I didn't want to know her source, so she would be the one who would have to go to jail if there were a judicial order.

But I think it's a similar problem, given the nature of these corporations. I don't think it's impossible, and I think there would be a bunch of sort of arbitrary decisions at the boundary. One question is whether you think that it's more important to have clearer lines with respect to freedom of speech than with respect to other contexts.

Professor Volokh: As it happens, I wrote an article about this some years back, looking at American law from the framing to the present. I don't think original meaning is necessarily dispositive; I mostly analyze matters in light of more modern precedents. But I think everybody acknowledges that original meaning matters—even liberal Justices do—and that tradition matters.

And in fact, basically almost without exception, from around the time of the framing to 1970, American courts said there is no special First Amendment right for the media. The freedom of the press is not the freedom of an industry or a business, an occupation called "the press." Rather, "the press" refers to the printing press; it's the freedom of all to use the technology of mass communication. And of course, today I think that includes the modern technologies that are heirs of the printing press, such as the Internet.

And then since 1970, I found basically a dozen lower-court cases taking the opposite view. A few Supreme Court cases also seemed to

left open the possibility that maybe the results might be different as to libel law, but the Court ultimately never took that up.

So, the doctrine that a particular line of business known as "the media" does not get any special First Amendment rights—it may sometimes get special statutory rights under some statutes, but no special First Amendment rights—is a very well established and traditional American doctrine. And I think today it's even clearer than before, because the technology makes it so much harder to tell who is a member of the press and who is not.

Professor Segall: So, my last question about *Citizens United*, I think, is did it change American politics? Because there is a huge perception that where the infusion of money and politics was always an issue in American politics, it became much worse after *Citizens United*.

Professor Dorf: Maybe. Part of the problem is that the Federal Elections Commission was set up to be a completely ineffective regulatory body. One of the things Justice Kennedy says to try to limit what the damage that he potentially sees is, "Well, don't worry, there's always disclosure."

And so, the move that is allowed by both the FEC and the IRS to 501(c)(4)s—that is to say that these so-called public welfare organizations that are then essentially ways of laundering money—that's not protected by the First Amendment under *Citizens United*. But, it's happened, and it's not clear to me what the relation between that and *Citizens United* is. But, I think that's a big piece. Although that's different from independent expenditures by corporations.

Professor Volokh: So, my understanding—and I tried to look this up a couple of years ago and couldn't get any really solid data—is that corporations have not taken that much advantage of the options made available by *Citizens United*. If anything, unions have taken more.

Again, remember, the limitations in the statute were on both corporations and unions. And the Supreme Court, in *Citizens United*, said both corporations and unions have these free speech rights.

Interestingly, in California, California law had never banned corporate spending. And actually, I did look that up; there was good data. Corporations spent less than unions, less than individuals, and less than Indian tribes.

So, my sense is that, while there's been a lot of money spent on various races, business corporations, sort of the GMs of the world, have not ended up spending a huge portion of what is being spent.

Professor Dorf: Can I say one final thing on that? So that suggests that the real problem, to the extent that there has been an uptick in money in politics, it's high-wealth individuals—the Mercers, the Koch brothers, Sheldon Adelson, there are probably people on the liberal side that I don't see demonized as frequently because of what I'm reading—that are able to give enormous amounts of money through independent expenditures. The elimination of the aggregate limits in *McCutcheon* doesn't do much for that because the aggregate limit was not what was doing the work for them.

That's a function of *Citizens United*, but only insofar as it maintains *Buckley*'s distinction between independent expenditures and contributions.

Professor Segall: And one closing note about *Citizens United*, because it's about Justice Kennedy, the rumor, the behind-the-scenes gossip is that it was Justice Kennedy who really forced Justice Roberts's hand to keep the case over one term to reach the broader issues in the case. If that is all true, it doesn't sound like Justice Kennedy to me. So, he must've been feeling very strongly about this, because they did end up deciding issues that the briefs did not bring forward very intentionally, in a way the Court doesn't normally do.

There's been a lot of talk recently, and some articles in the *New York Times* and other places, that the First Amendment is being

Lochner-ized. And what the critics mean by that is, in the *Janus* case involving union dues and the abortion case out of California this term and a bunch of others, the Court is using the First Amendment to deregulate in a way that, if they didn't use speech, they would be criticized for doing *Lochner*. But because it is speech, it is somehow different. And I'm wondering if you guys had thoughts on that.

Professor Volokh: So, I've always thought that the main criticism of *Lochner* is that the liberty of contracts, setting aside the obligation of the Contracts Clause, doesn't appear in the Constitution. But enforcing a constitutional right to deregulate things when it comes to speech, well, that's been the history of free speech law. So, I don't quite see the force of that objection as such.

Now, there are particular sub-objections you can make, or particular echoes of that. One might be that one shouldn't use free speech in order to free businesses from regulations of fundamentally business-related communications. That was, in fact, Justice Rehnquist's objection, with citations to *Lochner*, in the commercial speech cases, where the driving forces on the other side were Justices Brennan, Blackmun, and Stevens.

But Justice Rehnquist lost that battle. Eventually, he gave up on that. And even he ended up being an occasional voice to protect commercial speech rights.

Sorrell is the most recent case—*Sorrell v. IMS Health*—that might fit the mold of the First Amendment being used to protect business communications. And in fact, the dissent, I think was Justice Breyer, raised that objection there. The majority there was the conservatives plus Justice Sotomayor, though Justice Sotomayor has expressed some doubt about *Sorrell* recently.

That wasn't exactly a commercial advertising case but had to do with aggregation of data by businesses. So you could imagine that kind of objection.

But it has nothing to do with *Janus*. It has nothing to do with the pregnancy crisis center regulations; they're not being regulated as commercially businesses, they're quite clearly nonprofits, generally speaking, providing, I think, basically free services. So any objection in those cases has to be based on something other than the regulability of commercial transactions.

Another objection might be that in *Janus*, for example, this is sort of upsetting the relationship between labor and management hammered out by legislatures. But again, upsetting legislative regulation has been the history of the First Amendment and labor law. To be sure, First Amendment law has at times, I think often incorrectly, upheld certain restrictions on labor speech and sometimes restriction on employer speech. But ever since the late 1930s, the Court has been saying the First Amendment does impose substantial restraints in the labor-law area.

Now, I actually think *Janus* is wrong because I think the unanimous decision in *Abood* was wrong. I think that, in fact, just as a substantive matter, there should be no problem with compelling people to contribute money to unions, or to Sierra Club, or NRA, or whatever else. I think it's often a bad idea. But setting aside maybe contributing to parties, I don't think that that's something that should be seen as unconstitutional. But I'm very unusual in that respect. And this objection has nothing to do with the *Lochner* objection. I think the broad *Lochner* objection really has no merit to it.

Professor Dorf: I agree with Eugene descriptively but not normatively, at least in part.

In *Sorrell*, there's this remarkable line where Justice Kennedy is pushing back against the *Lochner* argument. And he quotes Holmes's famous dissent in *Lochner*. So, Holmes says, "The Constitution does not enact Herbert Spencer's Social Statics." Herbert Spencer wrote a book called Social Statics, which was basically what we would now call a libertarian tract.

Kennedy quotes Holmes. He says, "The Constitution doesn't enact Herbert Spencer's Social Statics. It does enact the First Amendment." He draws exactly the line that Eugene draws. It's a good line. And when I say "a good line," I mean it is a good turn of phrase. I don't think it's a good legal line for Justice Kennedy to draw for two basic reasons. One is, it relies on a sharp distinction between enumerated and unenumerated rights, which Justice Kennedy generally rejected. That is, he was not somebody who thought that substantive due process only incorporates the Bill of Rights and that there are no unenumerated rights. We had a whole panel on his expansive idea of unenumerated rights. So, he can't rely on the fact that there is an explicit enumeration of a free speech right because he thinks there can be other rights that are unenumerated.

Second, I think what the meaning of the overruling of *Lochner* is is highly contested. And it's contested because the meaning of Holmes's dissent in *Lochner* is unclear. On the one hand, there's language of general judicial restraint, and that was the view of people like Felix Frankfurter, who thought that when the Court in *West Coast Hotel* overruled *Lochner*, it was just sort of going to defer to legislative action full stop.

But, there's also the idea that the Constitution does not embody a particular economic theory that says that this was a retreat from aggressive judicial review with respect to regulation of the economy as to which Supreme Court Justices have no special expertise, and the rough and tumble of politics is the proper forum.

If that's your view, then it doesn't much matter whether your textual basis for intervention is the Due Process Clause or the Free Speech Clause of the First Amendment. You still want to leave that to the rough and tumble of politics.

So, while I do think that the worry that the Court is going to reinstate *Lochner* but just under the First Amendment is overblown, I don't think it's an analytically problematic idea.

Professor Segall: I do want to say that Adam Liptak, who was supposed to be on this panel and who wrote the column about *Lochner*-izing the First Amendment or quoted a lot of law professors in that column, I wish he was here to push back because I do think there is a lot of judicial aggression in the First Amendment cases of the last ten years that's reminiscent of *Lochner*.

And I will also say that Eugene wrote an excellent amicus brief in the *Janus* case with Professor Will Baude that I was hoping would convince Justice Kennedy. But apparently, it did not.

Professor Volokh: We were hoping, too.

So, the First Amendment has been used aggressively against legislation since 1931.

Now, you're limiting your statement to cases reminiscent of *Lochner*. But it's interesting how much gets thrown in within that rubric. At least *Janus* you could say, well, again, that's labor relations. But again the First Amendment has been used aggressively in the area of striking down what are seen as undue restrictions on both employers' speech and employees' speech, union speech, since the late 1930s.

But *NIFLA*, the case involving disclosures by pregnancy counseling centers, whatever it is, it's not a regulation of commerce. It's not that "Oh, we're trying to deal with the influence of kind of powerful, moneyed interests who are duping consumers or who are mis-paying their employees" or whatever.

Now, you could talk about other things there. You could say that maybe when you're regulating speech about health that's done by people who are sort of like the professionals we've historically regulated, then you should be free to do that. But rejecting such speech restrictions is not at all *Lochner*. And this seems to me to show that this *Lochner*-izing trope is being used basically to condemn all these decisions to strike down speech restrictions that

the trope users dislike, without any real explanation of where the line is going to be drawn.

Professor Segall: No, I think that's fair. I think by *Lochner* what that article wrote and what some law professors think is it's overreaching, overextending the way *Lochner* did, not because it's business, it's just overreaching.

Professor Volokh: Right. Right. So what it really means is it's reaching free speech decisions to strike down statutes that we think are wrong.

Professor Segall: Exactly.

Professor Volokh: That's really the only use of *Lochner*. It's similar on the theory that *Lochner* was wrong, and these are wrong. Well, all right. People have been criticizing the Court's free speech decisions on the grounds that they are wrong for almost 100 years now.

Professor Segall: So, we're going to transition now from speech to religion. And we're going to get less doctrinal, at least to begin with, because during the term that Mike did clerk for Justice Kennedy, which was the term Justice Kennedy came out, sort of speaking, because prior to that term he had voted with Justice Rehnquist, I believe, 94% or 96% of the time. And then in 1991, '92, he joined the *Casey* decision, which we talked about. And he authored *Lee v. Weisman*, which struck down prayers at high school graduation ceremonies. And he did that after endorsing a coercion test for Establishment Clause cases that—in other areas—that suggested unless the government makes you do something, the Establishment Clause isn't violated, and those graduation ceremonies were voluntary. So, this was a decision that angered the Right maybe as much as *Casey* in the short term.

Do we have a theory as to why Justice Kennedy did that? And part of that is, did he have an overall religion clause jurisprudence?

Professor Dorf: Let me fill in a little bit of the details. So the main test for whether a law violates the Establishment Clause is the so-called "*Lemon* test." It's not the exclusive test, and it's been criticized in various ways. And it has three pieces, whether the government's primary purpose is to advance religion, whether the primary effect is to advance religion, and whether there is undue entanglement between government and religion. And failing any one of those prongs means that the law is invalid. And as I said, it's been criticized to a great degree.

Justice O'Connor had been pushing the ideat that the way to tell whether the primary effect of a law is to advance religion is to ask whether it impermissibly endorses either a particular religion or religion in general and thus communicates to nonbelievers or dissenters that they are somehow outside of the community. And she had been pushing that a little bit before Justice Kennedy joined the Court. He joins the Court, and he pushes back and says, "No, the question should not be endorsement. It should be whether the law coerces religion."

Now, this has always struck me as a peculiar analytical move because whether one is being coerced into participating in a religious exercise is a matter of free exercise rather than establishment.

The key dissent in which Kennedy promotes his coercion test *Allegheny* case, which was a public display case. But his tone is very much sort of grievance politics. It sounds like he's complaining about the War on Christmas. But he has one very peculiar line where he's explaining the—I'm sorry, It's a very long-winded answer. He's explaining his—

Professor Segall: You were there. It's okay.

Professor Dorf: Well, I wasn't there in '89.

He's explaining his coercion test, and he says, "Well, you know, maybe a permanent Latin cross on city hall, that might go too far."

And he said, "Well, how would that be coercive? That would be an endorsement." So, it's very sort of confused.

And then in 1992 in *Lee v. Weisman*, he says, "Well, a prayer at a high school graduation, that violates the Establishment Clause." Even though you're not technically required to go to the high school graduation, even though there's no requirement that you even participate in the prayer, you could just sit or stand quietly and respectfully. And so people said, "Well, what's going on here?"

What I think is going on there, in both his adoption of the coercion test and the application of it, is Justice Kennedy's libertarianism. That is, the Establishment Clause, insofar as we think of it as having a structural value, sort of leaves him cold. What he really cares about is liberty, and he's imagining high school students at their graduation who have a choice not to go, but it's not a real choice. Everybody wants to go. And there's going to be all sorts of peer pressure. And so Kennedy may be right or he may be wrong. But either way he's a libertarian—he's trying funnel liberty through the Establishment Clause.

Professor Volokh: So I think that all makes a lot of sense. And I just want to try to elaborate a little more by stepping back and explaining what I think is the problem as to government religious speech: prayers, crèches, and the like.

Let me just start with a bit about myself. I am completely irreligious. My parents came from the Soviet Union. They disapproved of virtually everything they were taught by the communists. But that whole scientific atheism thing? It made sense to them. That's how I was brought up. That's me.

So I come to America, and I don't end up being much acculturated into American religious traditions, either. To this day, if you watch me during a Pledge of Allegiance, I won't say "under God." Likewise, I generally affirm rather than swearing.

But I think that the Court has made a big mistake in trying to root out speech that endorses religion. First, it led the Court to all sorts of contortions. And it led ultimately, I think, to much more religious tension than the Court was supposedly fixing through that the endorsement test. I think that what Justice Kennedy was trying to do with his coercion approach, which I'm not sure is a great success either, is to try to offer an alternative to the endorsement test, a test that I think is ultimately doomed to failure.

And the reason why is simply that American culture, both in the past and today, is chock-full of religious references from a religious people. We see that in the names of cities, back where I live now, in California, of course, from the Catholic tradition: Los Angeles, Sacramento, San Francisco. But of course there's also Providence, Rhode Island.

We see that in the Star-Spangled Banner. One of the stanzas—we generally don't sing it, but it's there—says "Let this be our motto, in God is our trust."

The Declaration of Independence, occasionally people say, "Well, you know, 'nature's God' and 'their creator,' that's just sort of this general deism. That's not really about an activist God." Well, except you get to the end, and they talk about how they appeal to the supreme judge of nations, not just a watchmaker god, and have a firm reliance on the protection of divine providence.

Now, I don't want to speak to whether Jefferson actually believed that. But Jefferson presumably knew his audience and knew what his audience cared about.

So if you really take seriously the endorsement test, you need to essentially engage in a campaign of extirpating every such reference. It's not quite like the Taliban blowing up the Buddhas. And it may be for a better purpose. But I think that's way it comes across to a lot of religious people. Certainly, that's the way it comes across to me.

This is not what Justice O'Connor—my former boss, but with whom I disagree on this—wanted to do with the endorsement test. But the problem is the endorsement test, taken seriously, tended to lead to that result, because in fact all these references, however historical, are in some measure endorsement of religion, perhaps in part because they're so tied to our nation's key documents.

But she understandably wasn't willing to let it go to that. So then there had to be all of these epicycles in order to make this flawed system work. "So, well, 'under God' in the Pledge of Allegiance isn't really religious, it's patriotic." I don't buy that.

Professor Segall: Justice Brennan said that.

Professor Volokh: That's true. And in the early school-prayer cases, for instance, he suggested that legislative prayer was fine, but then in the legislative prayer case, he actually kind of walked that back. People who have been promoting the endorsement test or earlier versions of the test have long said, "Oh, no, no, of course it wouldn't lead to those results." And then it began to lead to those results.

Justice Kennedy was trying to react to that and trying to focus on coercion rather than just on what offends people through its religiosity. First, offensiveness, is in the eyes of the beholder, but second, some amount of offensiveness is going to be inevitable either from religious references or from removal of religious references. I'm not sure he did a good job dealing with these issues in *Lee v. Weisman*, but I think it's ultimately his coercion approach is more worthwhile than trying to get rid of every religious reference or references that endorse religion, which ends up either amounting to removing all religious references or amounting to nothing really predictable.

Professor Dorf: Just as one final thought on this. People talk a lot about *Lee v. Weisman*. It's one of the two cases that I can think of in which Justice Kennedy is with the liberals in an Establishment Clause case, the other one being the follow-up to it, involving

student-led prayer. Overwhelmingly, he's voting to uphold—challenge practices when people say that they violate the Establishment Clause.

Professor Segall: Well, and I want to mention that just a few years ago in the *Greece* case, where a town in upstate New York had exclusively Christian prayers at their legislature, Justice Kennedy went the other way. And the decision was completely different in almost every way from *Lee v. Weisman* because it turns out children had to go to that legislature once or twice a year as part of a civics day and see only Christian prayers. And I'm wondering if—

Professor Dorf: But seeing is different from participating in, right? His line in *Lee v. Weisman* is that the students are going to feel coerced to participate. That's different from witnessing.

Professor Volokh: No, I actually don't quite agree—

Professor Dorf: I think the case was wrongly decided. But, I think that's how he would distinguish it.

Professor Volokh: So two things to note. One thing about *Greece* is, at that point, the dissenters, the liberals said, "You know, we are fine with legislative prayer, generally." That's the *Marsh v. Chambers* decision, which was six to three in the early 1980s, but is now unanimously accepted. Even the liberals, I would assume, are on board with the endorsement test more or less (though with Breyer, it's hard to tell). But, even they are willing to say, "Well, legislative prayers generally are so historically accepted that that battle's over and done with."

The second thing: A common argument in a lot of these Establishment Clause cases is that the purpose of the Establishment Clause is to diminish religious divisiveness. That was an argument often given early in the *Lemon* era for why certain kinds of restrictions were seen as excessively entangling. That was also an argument that Justice Breyer embraced as a part of his test in *Van Orden v. Perry*, one of the Ten Commandments cases.

Here is my conjecture, though perhaps social scientists can tell me more because this is just seat-of-the-pants perception. My sense is that attempts to restrict government religious speech have created much more religious divisiveness and much more hostility to my group, which is the irreligious, than the underlying religious speech actually did.

Now, you might say, "That's the fault of the opponents of the endorsement test. They're the ones who are being divisive because they're speaking out against these just, righteous decisions." But then that stops being a divisiveness inquiry. It becomes a claim, "Well, here is the right answer, and we don't care if it's divisive or not."

And if your concern is really divisiveness, then my guess is that taking a hands-off approach in this area, which is, "Government can say more or less whatever it pleases, leave it to the political process and leave it to political accommodation," would yield less religious divisiveness. I also think it would lead to less of a sense, in many respects, of aggrievement: Once you tell people you have a constitutional right to be free from endorsements, then things that they themselves might have largely ignored as just interesting historical carryovers now become violations of their rights. So I think the endorsement test and its predecessors have been a real step backwards in this area.

Professor Segall: And two closing points on that. Just a couple weeks ago, the Eleventh Circuit ordered Pensacola, Florida, to remove a permanent cross from one of their parks that had been there a very long time. And the dissenting opinion in the Eleventh Circuit was unusually harsh about Supreme Court precedent.

But one other interesting thing about this area of the law, religious symbols on government property, is it might be one of the only major areas of law past 2005 where Justice Kennedy was not the swing vote. It turned out Justice Breyer ended up being the swing vote because he went both ways in the Ten Commandments case. And there aren't many areas of law where Justice Kennedy—

Professor Dorf: And in fact, he tried to draw this line that Eugene is drawing, right? That is, they had these two cases. One involved a paper display in a courthouse. And the other—

Professor Segall: That was Judge Moore, by the way.

Professor Dorf: Right. And the other involved monuments in the park at the capitol in Austin, Texas, which are like giant stone monuments. Breyer thought that the giant stone monuments were okay, even though they were permanent, whereas the paper thing in the courthouse was not. But one of his reasons I think is very attuned to this is that if you tell them they have to remove the monuments, the act of removal itself is going to be a kind of religious offense to the people who support them. So, there's something to that.

Professor Segall: Yes. The people of Pensacola are pretty mad right now.

I want to talk about a religion case that Justice Kennedy didn't write, a huge case, but I've never quite understood why he joined. And that is the *Smith* case, *Oregon v. Smith*. So, one of the big questions in constitutional law has been, for a long time, do generally applicable laws that burden religious practices, do people of faith get to get exemptions from that? And from 1963 to 1990, the Supreme Court set up a balancing test. And then Justice Scalia ended all of that in 1990, saying that no, the Free Exercise Clause does not require any free exercise exemptions from generally applicable laws.

Justice Kennedy joined that opinion. And we're going to hear later from Professor Griffin, I think, about Kennedy's views on judicial supremacy. And he clearly had those views. Justice Kennedy struck down more laws than any Justice. But he was willing to take the Court out of the evaluation of religious exemptions. And I'm wondering if you have theories as to why that was one area where he said no judge—he agreed with Scalia—"Judges shouldn't be in this business at all."

Professor Dorf: I don't have a good answer to that.

I want to make two observations. One is how remarkable it is that the political or ideological valence of religious exemptions has completely flipped from that time. In 1990, it's the liberals, mostly—not Stevens, who didn't like religion in either free exercise or establishment cases—but the other liberals are in dissent. They want people to be able to have exemptions. And it's the conservatives saying, "No, no exemptions. You have to follow the same rules as everybody else." And then along comes a case like *Hobby Lobby*, and it's the conservatives who are all on board, and the liberals are on the other side.

Now, one case is constitutional, the other is statutory. You can thread the doctrinal needle. But in terms of the respective druthers, you want to know, well, what's going on. An obvious legal realist answer is that in *Smith* what's going on is it's a minority religion, it's a Native American practice of smoking peyote, so the liberals are sympathetic. They're thinking of it as a kind of cultural rights case. The conservatives are thinking that these are just druggies. Whereas now, it's Christians who are claiming the exceptions.

And I think there's something to that, except that everybody should have been smart enough in *Smith* to know that whatever rule they're laying down in that case is going to apply to conservative Christians also. And so that's not a sufficient explanation.

The best that I can come up with respect to Justice Kennedy there is that what Scalia does in his opinion is to assimilate the Free Exercise Clause to a larger body of doctrine mostly involving equal protection and freedom of speech, which doesn't generally have exceptions. It's very sort of rule oriented.

And for all that we've talked about Justice Kennedy's anti-formalism and nonstandard approach to doctrine, he was pretty doctrinal in the free speech area. So, insofar as Scalia saying, "Hey, look. If this were speech you wouldn't get an exception. And religion's part of the same First Amendment," Kennedy is willing to go along on doctrinal grounds.

That's my hypothesis. I don't have a lot of faith in it.

Professor Volokh: So, I think there are two quite different things one needs to think about here. One is the constitutional side and the other is the statutory exemptions.

I think as a constitutional matter, to me the interesting question is why Justice White joined the majority in the *Employment Division v. Smith* case. The majority was written by Justice Scalia. It was joined by Justices Rehnquist and Stevens, who had long been critics of the religious-exemption regime; *Smith* was basically building on the arguments made by Rehnquist and Stevens before It was joined by Justice Kennedy. And it was joined by and Justice White.

Now, Justice White had not long been a critic of that the religious exemption regime. He was with the majority in granting the exemption in *Wisconsin v. Yoder*, the Amish parents case. And he was the only Justice who would have voted to give relief to the American Indian claimant in *Bowen v. Roy*. It was eight to one, and he was the one who had the broadest view of the religious exemption regime.

So why did he change his view? And I think part of my sense is that the Court's experience with the free exercise jurisprudence from 1963 to 1990 showed it was pretty badly broken and that Justice Scalia's approach seemed to offer a good alternative to that. Under the so-called *Sherbert*/*Yoder* model, from the two leading cases that adopted it, basically any time a religious person sincerely claimed that they were being pressured to do something that they weren't allowed to do under their religion, or barred from doing something they were required to, they'd have to get an exemption unless the law could pass strict scrutiny.

Now that's much like the RFRA test, or RLUIPA, which is the prison version of RFRA. But the *Sherbert*/*Yoder* rule adopted that strict scrutiny approach as a constitutional matter. It wasn't just up to Congress or the legislature to decide whether to create these

exemptions. Nor could the legislature say, "You know, you're giving exemptions from this law that we think do undermine a compelling interest," And therefore reject the exemptions. The legislature couldn't do anything about to cancel such exemptions.

It seems to me that this is not a particularly appealing approach. It's an interesting question what the original meaning of the Free Exercise Clause might have been; there was a later case, *City of Boerne v. Flores*, where there was debate about the original meaning. But setting that aside, I don't think the *Sherbert*/*Yoder* approach is particularly appealing—giving religious objectors a constitutional entitlement to an exemption unless strict scrutiny is satisfied.

Unsurprisingly, the Court during the pre-*Smith* era ended up watering down strict scrutiny in a lot of these cases in order to deny the exemptions. So, I think it was the right decision. And, I should tell you, I've been saying this since 1999, when I was one of the very, very few people—I think Mark Tushnet was another one—saying this; and I was sharply disagreed with by most liberals on this point, who said that Justice Scalia was wrong here.

In 1993, Congress passed the Religious Freedom Restoration Act to reinstate the religious exemption approach as a statutory matter. By the way, speaking of which religions are being burdened by the rejection of religious exemptions, *City of Boerne v. Flores*, where the Court held that RFRA couldn't apply to state or local governments, rejected a claim brought by the Catholic Church. Justice Scalia, true to his principle, says, "You know, of course the Church should lose here."

But, the statute remains in effect as to federal law. And there are similar statutes in many states, as well as some state constitutional provisions that have been interpreted as providing similar protections. And RLUIPA applies that doctrine to prisons that get federal funds, including state prisons.

As to *Hobby Lobby*, it's just the most prominent of three RFRA or RLUIPA cases the Court decided over the last ten years. One was *Hobby Lobby*, in which the claimants were Christians. Another was *Gonzales v. O Centro*, where the claimants were a hallucinogen-using religion from Brazil. And a third was *Holt v. Hobbs*, where the claimant was a Muslim who was being barred from wearing a beard in prison, even a very short beard.

In *Hobby Lobby*, it's true that the Christian claimants win by a five-four vote. But in *Holt v. Hobbs*, the Muslim claimant wins by a nine-zero vote. In *Gonzales v. O Centro*, this small group, which actually religious beliefs are pretty similar to though less familiar than the American Indian claimants in *Smith,* win by an eight-zero vote.

And indeed the religious claimants have been more successful at the Court under RFRA and RLUIPA than they had been under the Free Exercise Clause before *Smith*. When Justices are being asked, "Tell the legislature that it's unconstitutional for you to apply this law to these people because of their Free Exercise Clause rights," many Justices say, "No, no, no. I'm not sure I want to second-guess the legislature this way."

But if the Justices are being asked to apply a legislatively enacted statute to essentially carve out an exemption from another legislatively enacted statute, or sometimes from a mere regulation, then the Justices are much more likely to say, "Okay, Congress told us to grant these exemptions, so we'll do it."

Professor Dorf: Let me just make two clarifications. First, when I said that there is a flip, I just meant in terms of the way this is perceived.

But second, there is one way in which there is a real tension. The argument for the approach in *Smith* is partly, Justice Scalia says, that judges are not qualified to apply this test that balances the government interest against the centrality of religious practice.

Well, if judges are unqualified to do it, you'd think they don't all of a sudden become qualified to do it under a statute.

Professor Volokh: Well, funny you should say that. So, the article I wrote—I think it was in '98, maybe '99—actually is all about that. And it is perhaps the only article that actually says Smith is right and RFRA is right, too. Although, I would have written RFRA in a less aggressive way.

And here is why. The thing that Scalia was objecting to, which is judges sort of balancing things under a kind of all-things-considered test, more or less, is actually what judges do utterly routinely in developing common law. To be sure, federal judges do that only in a few areas, like admiralty jurisdiction. But certainly, American judges do that all the time.

They are specifically statutorily called on to do this in developing privileges. Federal Rule of Evidence 501 specifically says that privileges shall be developed by courts in light of reason and experience. They're called on to do that, essentially, under the Fair Use doctrine, under the Sherman Anti-Trust Act, although the interesting question is whether they were right to interpret it that way.

But in any event, so I think what Scalia was saying—and he didn't get into it in detail because I think he had no occasion to do that—is that we can't have a constitutional rule that says this is unconstitutional if, on balance, we think that, really, your interest isn't that important. To be sure, it's something we do in areas like free speech and equal protection, but not across the whole area. In fact, I think that would be *Lochner* on steroids.

But when it's done pursuant to statutory command subject to possible legislative override, that, I think, is something that's legitimate.

Professor Segall: I just want to say that my original question was why was Kennedy shy here and almost no place else, and I'm not sure that we figured that out.

But before we take questions, we have to spend—and we have about three minutes to do it—on, of course, the recent travel-ban case. And let's just stick to the Establishment Clause issue in the travel-ban case, where of course, just by very, very brief background, President Trump made, as a candidate and as a President early on, a lot of statements suggesting, of course, anti-Muslim bias and all of that. And the Court ends up upholding it, and Justice Kennedy writes a concurring opinion, and very short, kind of wringing his hands. Is that fair? Saying, "We have to uphold this, but I'm really afraid." What does this tell us about Justice Kennedy? And is it more about his last term on the Court than about his career?

Professor Dorf: Yes, right. Here you have someone who, we've said, he was the most willing to interfere with work done by the political branches. The most sympathetic way I can read Justice Kennedy's concurrence in Hawaii against Trump is in light of Larry Sager's idea of an under-enforced constitutional norm.

So, Professor—Dean Sager has this idea that there are certain constitutional norms that apply to political actors but that the courts don't fully enforce because of institutional limits. But, that doesn't mean the politicians don't have an obligation to abide by a more robust version of them. Sager has the idea that the rational basis test is an example of that.

I read Kennedy's opinion, insofar as I'm trying to read it sympathetically, as saying, "Look, there are institutional reasons why we have to defer to the executive here, especially with respect to this third version of the ban, for which the government did do a lot of homework and put forward a justification, and yeah, maybe it's true that they wouldn't have gotten to it in the first place were it not for the explicit ban on Muslims. But, that's not what this is, and if it is, it's not something we can unearth. But, if it is that, that's really bad. And hey, political system, deal with it." That's the best spin that I think can be put on it.

The problem with that is, as I say, it's not consistent with Justice Kennedy's general approach, which is not to have a robust political question doctrine and not to be afraid of a conflict with the political branches.

Professor Segall: One minute.

Professor Volokh: I think that the travel-ban case was a really hard case, and I think that Kennedy's opinion reflects that. As a general matter, we have a strong norm of nondiscrimination based on religion. But at the same time, I think we are entitled as a nation to do all sorts of things having to do with our foreign relations and deciding whom to let in the country that are unpleasant and that would be forbidden if done purely domestically. That's life in the world.

I think that the travel ban was a bad idea for various reasons, one of which is this: there are a billion Muslims out there who have a lot of different beliefs. I don't think there is an Islam. I think there are Islams, just like there are many strands of Christianity.

On the other hand, let's say somebody comes up and says, "You know, I'm a big believer in ISIS. I think they totally have the right theology and the right approach to things. I'm not a member. I haven't actually committed any crimes. But, I'm a believer. I would like to immigrate to the U.S." I'm not sure we need to let them in, even though we couldn't restrict such speech or religious adherence by Americans.

It's like Ernst Zündel, a Holocaust denier who recently died. Shortly before his death, he tried to immigrate to the U.S. because his wife is a U.S. citizen. He was refused. I think the decision was wrong in its logic, but I think the underlying sentiment is probably right. We have to tolerate these fools here. It doesn't mean we have to import them.

Now, it may be that there should be a different rule as to religion than as to speech. *Kleindienst v. Mandel*, by the way, applies that

very rule to speech more or less, saying that it's okay to exclude, for instance socialists, even though you couldn't criminalize socialism.

And again, I think the travel ban is a bad idea because there's no particular reason to think those countries are that dangerous or that the people coming from them, with proper vetting, are that dangerous. But, I think that Kennedy concluded the government was entitled to latitude to do some unpleasant things when it comes to these kinds of national security and entry-from-foreign-country decisions. And I think he had good reason to.

Professor Segall: And just to cap that off, and then we'll take questions. One piece of data is this last term, I think, is the only term where Justice Kennedy voted with the conservatives in every five-four case and that there may be some pattern to that in his last term on the Court.

Professor Dorf: Except when he was—oh, yeah. You know what? I take that back, yeah.

Professor Segall: Questions from the audience?

Professor Ilya Somin: Ilya Somin, George Mason University. I just have two sort of hopefully quick questions.

One is primarily for Eugene. When he said that you would get rid of the non-endorsement test for the Establishment Clause, I wonder how far would you take that? Could, for instance, the state of Utah say, "We endorse Mormonism as the official religion. We think it's the best religion that everyone should follow. We won't coerce anybody into doing it. We're just making that the official view of the state of Utah." I wonder if, under your watch, that would be okay.

And then the other, for everybody, really, is about *Citizens United*. The standard criticism of Kennedy in the *Citizens United* majority, generally, is that they take too narrow a view of what counts as corruption, that it's not just quid pro quo, it's spending money that

could lead to expectations, that the expenditure of money will influence elections, it will influence policy.

If this is true, why doesn't the same thing occur from the expenditure of any kind of resources or the anticipation thereof, such as the use of your celebrity to endorse or promote a candidacy, the use of various skills and positions of influence, and so on? You could say, "Well, those positions and skills and celebrities are deserved in a way that money is not." But we know that they depend, to a large extent on genetics, on luck, on various other things that might not be very fair.

So, is there a good reason to distinguish between the quote-unquote "corruption of money" versus the corruption of celebrity or the corruption of pretty much anything else that is a resource that people could use to influence the political process? And obviously, those other resources are also very unequally distributed, in some cases even more unequally than money.

Professor Volokh: So to answer the question that Ilya posed to me, I think it would be bad for Utah to announce that Mormonism is the official religion of Utah. But I'm pretty sure they didn't do that before 1980, to use the date of *Stone v. Graham* as an early proto-endorsement case. There are actually pretty powerful political checks on that. There's a reason that, generally speaking, there is a good deal of latitudinarianism in public pronouncements by government this way.

Now to be sure, that isn't always so. There are, for example, cities that have explicit religious symbols on their city seals. There certainly are going to be occasional statements by the government that are overtly religious. Sometimes you have particular kind of religions, especially who are presented in legislative prayers and such.

But to the extent that the political processes allow that, I just don't think that that's such a horrible thing. I don't think it's something

that is clearly forbidden by the Constitution, which bans an establishment of religion. I think the framers had a pretty good idea of what an established religion was. It was a religion that was given special institutional discrimination in its favor, for example, with rules that only members of this religion could hold office, or with specialized block grants given to the religion.

You could imagine some doctrine under which an official statutory pronouncement saying, "X is the official religion of our jurisdiction," might qualify as establishment. But I'd rather not police that line, because once you start policing the line then there is the question, "What about a Christmas tree?" which, by the way, our family has long had and sees nothing religious about, likely because of our Russian background. Perhaps your family took the same view.

What about the names of cities? There was a lawsuit not quite about the name of the city but about a city that had three crosses on its seal. It was Las Cruces, New Mexico. And the Tenth Circuit rightly rejected that. Do people who are in Las Cruces, are they reminded by the seal and by the name about the Catholic tradition, and about the probably still enduring Catholic, or at least Christian, majority there? Sure. But whatever the problems are with that, courts trying to police that makes them worse.

Professor Dorf: I'll give a thirty-second answer to Ilya's second question.

Think about a bribery case. Suppose it's someone, a talented individual, a musician said to a politician, "I will play a personal concert for you in exchange for your voting for me the way I want you to on this bill." That would be a bribe. I'm pretty sure that would be a thing of value under the law.

So, the problem isn't the distinction between money and other sort of goods and services and so forth. It's this narrower notion of corruption. Now, there are line-drawing problems, but I don't think that's the one that I would focus on.

Professor Volokh: No, but I think—

Professor Segall: Eugene, hold on. Let's go to the next question.

Professor Volokh: Fair enough.

Professor Segall: Pam, go ahead.

Professor Pam Karlan: Pam Karlan, Stanford Law School.

This was a fascinating panel. And one of the things I wondered if you both might comment on is a huge change that was occurring in society—and I think, Eugene, you kind of almost alluded to this—in the backdrop as the Court confronted these First Amendment issues, which is over the course of Justice Kennedy's time on the Court, we had rising economic inequality in America, which may be driving some of the concern in this, and a rising tension of religious fundamentalisms around the world. And it's against that backdrop that they're deciding these cases, and I just wonder why the Court seems so much less able to, in this area, incorporate some understanding of the change in the ambient world than in, for example, the Fourth Amendment with technology.

Professor Volokh: So I think that at least Justice Kennedy—but I think the others, too—think that they're dealing with enduring values here, and that it doesn't matter if this is a world with a lot of religious fundamentalism or less, or it's more visible now than before, or it's a different kind than before. I think their sense is that the principles apply even when there's more fundamentalism. Cellphones are different; we never had cellphones before, so the question is how do we adapt something to a genuinely new technology.

Likewise, I think with regard to economic inequality, I think it's very much a matter of degree. Certainly complaints about undue influence from the rich and powerful have been around for a long time. The newspaper barons of old had the ability to control whom their newspapers endorsed, and more importantly the coverage in the

newspaper, which would give them the opportunity to get this kind of implied quid pro quo with legislators.

So, I think that if you ask the Justices that, they'd say, "To the extent there have been changes, they have been changes of degree and not really vast changes of degree, and we can't let our doctrine turn on how much of that there is in any particular decade."

Professor Dorf: On the point about rising economic inequality, presumably that matters a great deal for campaign finance. It also might matter for access to other kinds of media for people who don't have means.

And there, I think this is a bastion of formalism, and it's driven in part by the cloistered nature of the Court. You talked about it on the first panel, that the Justices can imagine having their cellphones monitored or their GPS on their cars. They have a hard time imagining what it's like not to have Internet access or getting your news from a single source and not being a sophisticated customer.

Now, I'm not sure how that would cash out in terms of actual doctrine, but I do think that that is a real problem. They all come from the same law schools. They had different experiences before that, to some degree. Justice Thomas is sort of unusual in that regard, in having actually grown up very poor. But, there is a real problem. But I don't think it's particular to the First Amendment.

Professor Segall: Pam, I want to comment on your question.

Since 1981, constitutional law has been driven by Justices Kennedy and O'Connor in every aspect. There are almost no cases where one of those two didn't drive the decision. And in my review of their careers, neither one had empathy for the poor.

Professor Dorf: Justice Kennedy represented indigent defendants early in his career.

Professor Segall: As a Justice. As a Justice, neither one showed empathy for laws and statutes that hurt the poor. Certainly, Justice O'Connor felt empathy for women but not for the poor.

And so I think that's a legal realist answer to your question. They're the only ones who counted, every case went their way, and they didn't care much about rising inequality.

Professor Volokh: But it's not just the poor in the standard criticism of campaign finance. It's not just about the poor not having equal access. It's about the poor and middle class and even upper middle class not having equal access. That's the objection. I think none of the Justices, even if they were allowed to under law, would be spending tens of thousands of dollars to back somebody's election campaign.

There are maybe other areas. And actually, I think Pam aptly pointed out that when you get the fees for various things and regulations that make things more time consuming, more burdensome, there they do hit the poor hardest. But that's not, at least that's not the sensible objection to cases like *Buckley v. Valeo*.

Professor Segall: Eric, last question.

Professor Eric Berger: Eric Berger, University of Nebraska.

One of the things that I find really difficult in teaching First Amendment free speech is there are all these areas of regulation that just seem wholly invisible to the First Amendment, things like tipping rules and securities law or fraud, copyright, where the courts—there are definitely arguments you could make that those would all be constitutional under free speech. But, the Court doesn't even go there. It sort of doesn't treat them as free speech.

Well, so that's my question is—after cases like Justice Thomas's majority opinion to *Town of Gilbert*, Eugene mentioned the *Sorrell* case, the *Janus* case—do you see the Court maybe wading into that

area more and treating some things as being reached by the First Amendment that we typically just ducked those questions?

Professor Volokh: Well, I'm not sure how much of it is ducking. The Court had dealt with a First Amendment objection to copyright law in *Harper & Row v. Nation Enterprises* in 1985. It rejected the objection, but not on the grounds, "Oh, this is copyright. There's no free speech issue here." Rather, it said that copyright law is a permissible restriction because it is specifically constitutionally authorized in a particular way, and because there's the safe harbor provided by fair use and by the idea/expression doctrine.

Again, that may be wrong in various ways. Certain parts of the decision, I think, definitely are wrong. But, the Court certainly took seriously the free speech objections.

Now, one thing that's been emerging since around 2006, which is shortly after I wrote a law review article criticizing this, is that the Court has the notion that certain speech can be restricted when it is integral to conduct—especially criminal conduct, but also tortious conduct. This has surfaced in a lot of cases. It was mentioned in the pregnancy counseling case. It came up in *Williams*, this solicitation of crime case. It's come up in a bunch of other cases.

So, the Court does seem to be reviving this doctrine, which was actually pioneered by Justice Black in many ways, who said he was a free speech absolutist. But the one way he dealt with some things like threats and fighting words and such is saying, "Well, they're closely linked to conduct."

So, I do think that the Court has been developing that exception. And I wrote a follow-up article discussing how the exception can be systematized, kind of conceding that they obviously didn't want to see things my way, so at least I'll try to see things theirs.

I think that this is going to be an increasingly more important doctrine for those kinds of cases. But the Court has paid attention to these kinds of things.

Professor Segall: Mike, the last word. Quickly.

Professor Dorf: So there are three principal ways the Court can reject a First Amendment claim.

One is to say it falls into some exception that's longstanding or that they've just made up and pretended is longstanding.

The second is they can apply strict or some other kind of heightened scrutiny, and say that the law satisfies it.

The third is that, as you suggest, they can just ignore it because it doesn't fit their conceptual frame, or worse, get themselves turned around.

Matal v. Tam is a great example of this last move. This was the case a couple of years ago in which the practice of the Patent and Trademark Office of not granting offensive trademarks was challenged as applied to a band of Asian Americans with the name The Slants that they were using ironically but that was deemed offensive. And the challengers win on grounds that this is content discrimination.

And the reason that's sort of backwards—I'm not saying it's wrong, but it's sort of backwards—is of course granting trademark protection actually reduces speech. So, they had this idea that you can't have a content-based restriction on speech. This isn't a content-based restriction on speech. This is a content-based exception to a restriction on speech. But they are not thinking of it in those terms. And I think there's a whole lot of that, of stuff that's just not on the radar. And sometimes when you raise it and they say, "Hey, this falls within some pre-existing doctrinal category." Maybe *Giboney v. Empire Storage & Ice*—which establishes the exception for speech integral to conduct—will end up being that sort of doctrine.

Professor Volokh: I will say that the *Matal v. Tam* question had been talked about as a First Amendment issue for decades.

Professor Segall: Thank you very much. Thank you.